

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 June 2003

Case No.: 2002-LHC-2520

OWCP No.: 07-157892

In the Matter of:

**ERNEST SNEAR,
Claimant**

v.

**NABORS OFFSHORE DRILLING, INC.
Employer**

APPEARANCES:

**JANET LEE MOULTON, ESQ.,
On Behalf of the Claimant**

**MAURICE E. BOSTICK, ESQ.,
On Behalf of the Employer/Carrier**

**BEFORE: RICHARD D. MILLS
Administrative Law Judges**

DECISION AND ORDER—DENYING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act" or "LHWCA"), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq., (the "OCSLA"). The claim is brought by Ernest Snear, Claimant, against his former employer, Nabors Offshore Drilling, Inc. ("Nabors"), Respondent. Claimant asserts that he suffered an employment-related injury to his neck, back, and left shoulder and arm, and left leg for which Nabors is responsible. A hearing was held on February 14, 2003 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Joint Exhibit 1;
- 2) Claimant's Exhibits Nos. 1-13;¹ and
- 3) Respondent's Exhibits Nos. 1-50.²

This decision is being rendered after giving full consideration to the entire record.³

STIPULATIONS⁴

The Court finds sufficient evidence to support the following stipulations:

This case is governed by the OCSLA.

- 1) There was an employer/employee relationship between Claimant and Respondent at the time of his alleged work-related accident.
- 2) Respondent was advised of the alleged injury on August 31, 2000.
- 3) A Notice of Controversion was filed on September 20, 2000.
- 4) An Informal Conference was held on July 10, 2002.
- 5) Respondent has paid to Claimant \$6,738.43 in medical benefits.

ISSUES

The unresolved issues in these proceedings are:

- 1) Fact of Injury and Causation;
- 2) Nature and Extent of Disability;

¹ Claimant's Exhibits 1-8 and 11 are chronicled in Respondent's Exhibits.

² At the hearing, the Court reserved ruling on the admission of Respondent's Exhibit 21, a surveillance tape of Claimant. After further review, the Court admits into evidence Respondent's Exhibit 21.

³ The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX - Claimant's Exhibit, RX - Respondent's Exhibit, and TR - Transcript of the Proceedings.

⁴ JX-1.

- 3) Wage-Earning Capacity;
- 4) Average Weekly Wage;
- 5) Reasonable and Necessary Medical Benefits;
- 6) Section 26 Sanctions; and
- 7) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Ernest Snear

Mr. Snear was hired by Nabors as a roustabout. TR. 29. He did not undergo a physical evaluation at the time of his hiring. TR. 30-31, 53. Mr. Snear testified that his duties at Nabors consisted of painting and rigging 75-80 pound cables. TR. 29-30, 94-95. Mr. Snear testified that he worked at Nabors 7 days a week for 12 hours per day, for a total of 84 hours per week. TR. 31. Although the Nabors schedule typically called for working only alternating weeks, Mr. Snear testified that he worked every week, without taking time off. TR. 31.

Mr. Snear testified that on August 28, 2000, he fell when his shoestring got caught on a ground screw. TR. 32. Mr. Snear testified that he was carrying a wrench and did not have enough time to break the fall with his hands. TR. 32. Instead, Mr. Snear broke the fall with his elbows to prevent his head from hitting the steel deck. TR. 32. At the time of his accident, Mr. Snear was working offshore on a platform in the Gulf of Mexico. TR. 30.

Mr. Snear testified that the accident was witnessed by two co-workers, Terry Jackson and Zimbery Brown.⁵ TR. 32-33, 52-53, 129-31. According to Mr. Snear, he told Mr. Jackson that he had hurt himself and Mr. Jackson advised him to report the accident. TR. 32-33, 52-53. Mr. Snear testified that Mr. Jackson advised him twice to report the accident, once at the time of the accident and again the next night. TR. 32-33, 52-53. Mr. Snear testified that after Mr. Jackson's second admonishment, he reported the accident to Nabors, namely Johnny Newport. TR. 33.

Mr. Snear testified that following the accident, he had complaints about his left leg, left arm, left shoulder, and neck. TR. 34, 37. Upon referral by his attorney, Mr. Snear first

⁵ Zimbery Brown is also known by the nickname "Zimmer." TR. 151.

consulted Dr. Norman Ott. TR. 33-34. Mr. Snear testified that he was told by Dr. Ott that his symptoms and complaints were not adding up. TR. 81. Mr. Snear testified that his attorney then referred him to Allied Medical Clinic (“Allied”), where he came under the care of Dr. Christine Webster. TR. 33-34, 81. According to Mr. Snear, he received only a hot pad and prescription medicine from Allied. TR. 34. Mr. Snear testified that his treatment at Allied was not helping his pain and he asked to be referred to a neurologist. TR. 34-35.

Mr. Snear testified that Allied referred him to Dr. Toussaint Leclercq, a neurosurgeon at LSU. TR. 35. According to Mr. Snear, Dr. Leclercq ordered an MRI of Mr. Snear’s left shoulder and neck. TR. 35. Mr. Snear testified that Dr. Leclercq indicated surgery would probably be required for two ruptured discs in Mr. Snear’s neck. TR. 35-36. Mr. Snear testified that Dr. Leclercq also recommended he see an orthopaedist for his shoulder. TR. 36. However, Nabors never approved an orthopedic exam. TR. 36.

Dr. Leclercq retired, and Mr. Snear thereafter came under the treatment of Dr. Bradley Bartholomew, also a neurosurgeon. TR. 37. Mr. Snear testified that Dr. Bartholomew recommended surgery and physical therapy for Mr. Snear’s neck but that Nabors refused to authorize those treatments. TR. 38-39. Mr. Snear testified that he stopped seeing Dr. Bartholomew because Nabors stopped authorizing his visits. TR. 39. Mr. Snear also testified that he was seen by Dr. John Steck, a neurologist referred by Nabors. TR. 39.

Mr. Snear testified that he never returned to work at Nabors after his alleged accident. TR. 35. Mr. Snear was issued a termination letter from Nabors about 5 or 6 months after his alleged accident. TR. 40. Mr. Snear testified that he has had about 41 employers in the past ten years and about 4 or 5 since he left Nabors. TR. 132-134. After his termination from Nabors, Mr. Snear’s employers included DNO Contractors, Pipeline Services, Inc. (“Pipeline Services”), Wallace C. Drennan, Inc. (“Drennan”), Kemper Construction Company (“Kemper”), and EBE Contractors, Inc. (“EBE”). TR. 41.

Mr. Snear testified that his first job after leaving Nabors was with DNO Contractors. TR. 101. Mr. Snear assisted in running drainage pipes for commercial property, helped build forms for concrete, cut and carried wood, and helped carry an electric generator weighing 50 to 65 pounds. TR. 102. Mr. Snear was employed by DNO Contractors about one month, working 10 hours per day for 4 to 5 days per week. TR. 102. He earned \$9.00 per hour. TR. 102. Mr. Snear testified that DNO Contractors indicated he was fired for insubordination. TR. 102.

With respect to Pipeline Services, Mr. Snear’s job involved lowering himself into 12-14 foot holes in the ground, applying a covering to pipes situated in those holes, and burying the pipe with dirt. TR. 44-45. Mr. Snear would lower himself into the holes by walking or climbing down a ladder. TR. 45. Mr. Snear testified that his left leg gave out on him one day while he was in a hole and that a machine had to be sent to retrieve him. TR. 45, 106. Pipeline Services laid off Mr. Snear after that incident. TR. 45. Mr. Snear was employed

at Pipeline Services for 2 to 3 months, working 40 hours per week and earning \$10.00 per hour. TR. 105-106.

With respect to Drennan, Mr. Snear performed cement work involving sidewalks, including building forms for the cement. TR. 45, 106-07. Mr. Snear was employed by Drennan about three months, working eight hours a day for five days a week. TR. 107-08. Mr. Snear testified that he was fired from Drennan due to excessive absences. TR. 46, 107. According to Mr. Snear, he missed work because the concrete was too heavy for him and his left leg kept giving out. TR. 46, 107-08. Mr. Snear maintained that his absences at Drennan were caused in part by his alleged accident at Nabors. TR. 112-13. However, Mr. Snear also indicated that he had worked for Drennan in 1996 and that he was discharged then also due to attendance violations. TR. 110.

With respect to Kemper, Mr. Snear worked as a carpenter's helper, with duties that included chipping concrete using a chipping gun, building walls, cleaning the work area, and other lightweight tasks. TR. 43, 114. Mr. Snear testified that he was laid off from Kemper after his attorney advised him to notify Kemper about his alleged injuries at Nabors. TR. 115. Mr. Snear worked at Kemper from September 2001 through November 2001. TR. 114.

Mr. Snear testified that he was employed by EBE for about a month and a half around March 2002. TR. 115. He earned \$10.00 per hour, working eight hours a day for five days a week. TR. 115. His work was located at Avondale Shipyard and involved painting ships. TR. 101, 115. Mr. Snear testified that while employed by EBE, he was involved in an accident on February 26, 2002, that aggravated his lower back condition. TR. 95-96. Mr. Snear testified that Dr. Rozas, who treated him for the EBE accident, indicated Mr. Snear had only light bruising on his back. TR. 144-45. According to Mr. Snear, Dr. Rozas released him back to work after two days. TR. 144-45. Mr. Snear did not file a workers' compensation claim for the EBE incident. TR. 145.

Despite being shown a report from Dr. Bartholomew indicating he had reported a worsening of his neck pain after the EBE accident, Mr. Snear denied that the EBE accident aggravated his neck condition. TR. 95-98. Mr. Snear explained that his prior attorney had advised him to tell Dr. Bartholomew falsely that the EBE accident re-affected his neck condition. TR. 97-98. Mr. Snear testified that he subsequently fired his prior attorney. TR. 99, 143.

Mr. Snear testified that he was currently working as a painter's helper at Industrial Coatings Contractors, Inc. ("Industrial Coatings"), a painting company. TR. 46. Mr. Snear had been employed by Industrial Coatings since September 2002, working 4 days a week for 10 hours per day. TR. 47, 115-16. Mr. Snear was being paid \$12.00 per hour. TR. 47. Mr. Snear testified that his duties included lifting 100-pound bags of sand to pour into a sandblasting machine. TR. 47, 117. He testified that he was required to lift and pour the

sand one or two days per week and that he would lift about 30 bags per day. TR. 47-49, 53. The bags of sand were set on a pallet about waist high, and Mr. Snear would spend ten hours per day on that task. TR. 47-49, 53. Mr. Snear also is required to carry buckets of paint weighing 60-80 pounds. TR. 117. At the time of the hearing, Mr. Snear had been working at Industrial Coatings for five months, and Mr. Snear testified that he has been able to perform his job duties at Industrial Coatings. TR. 120.

Mr. Snear testified that he was injured on May 24, 1999, prior to his employment with Nabors, when he was struck across his back with a piece of steel rebar about 7 or 8 feet long. TR. 49-50, 59-60. Mr. Snear was employed by K. B. Kaufmann & Co., Inc. ("Kaufmann"), at the time. TR. 49, 59-60. Mr. Snear testified that he was struck diagonally from his left shoulder down to the right side of his low back. TR. 51. Mr. Snear was treated by Dr. Steven Flood, a neurologist, for the Kaufmann accident and was given a hot pad and some physiotherapy. TR. 50-51. Mr. Snear testified that he had pain in his left shoulder, right back, and neck due to the Kaufmann accident. TR. 74, 134. Mr. Snear testified that he had all those pains prior to his alleged accident at Nabors. TR. 74. However, Mr. Snear testified that the Nabors incident made his prior injuries worse and that he now has pain that runs down his left arm from his armpit to his wrist, which he did not have following the Kaufmann accident. TR. 87, 141. Mr. Snear testified that compared to his condition following the Kaufmann incident, he has decreased utility in his left arm after his alleged injuries at Nabors. TR. 140.

Mr. Snear's testimony indicates that he has lied on numerous occasions regarding the status of his health. For instance, Mr. Snear admitted he lied under oath at his deposition when he denied having neck pain prior to working at Nabors. TR. 66-67, 70-71. Regarding that lie, Mr. Snear explained, "I don't think there's a person in this room that haven't [*sic*] lied before about something or another." TR. 71-72.

Mr. Snear testified that he would tell a doctor the truth if the doctor asked about his prior medical history. TR. 77-78. However, Mr. Snear admitted he lied to Dr. Ott regarding whether he had any accidents or injuries prior to the alleged Nabors accident and whether he had any neck or back problems prior to the alleged Nabors accident. TR. 79. When asked why he lied to Dr. Ott, Mr. Snear responded, "I can't even tell you why. I don't even know why." TR. 79.

Furthermore, Mr. Snear initially acknowledged that he denied to Dr. Steck a history of his leg giving way, despite the fact that his left leg had given way prior to the Nabors accident. TR. 82. Regarding this inconsistency, Mr. Snear explained that he had probably forgotten that his left leg had given way. TR. 82. However, Mr. Snear later denied altogether that his left leg went out on him prior to the Nabors accident, despite records from Dr. Flood and Dr. Ott indicating otherwise. TR. 106.

In addition, despite the fact that an MRI of Mr. Snear's neck was taken in 1999, Dr. Bartholomew's records from October 2001 indicate that Mr. Snear had reported that no MRIs were performed concerning his 1999 accident. TR. 82-83. Mr. Snear denied intentionally concealing from Dr. Bartholomew the fact that an MRI of his neck was performed in 1999. TR. 83.

Mr. Snear admitted lying to numerous employers about his medical and employment history. With respect to his July 18, 2000 application to Nabors, Mr. Snear admitted he lied to Nabors about never having had a neck, back, hand, arm, knee, or leg injury. TR. 59. Mr. Snear also testified that he lied regarding completing the twelfth grade. TR. 55. Mr. Snear also did not list Kaufmann as one of his previous employers because he did not want Nabors to find out he had filed a workers' compensation claim against Kaufmann. TR. 56-57. Mr. Snear also admitted lying to Nabors about never having drawn workers' compensation. TR. 63. Mr. Snear acknowledged that he received workers' compensation in 1985 and that a settlement was reached concerning his claim for the Kaufmann accident. TR. 64. Mr. Snear testified that he lied on his application to Nabors because he wanted to be employed and make money. TR. 62-63.

Mr. Snear testified that prior to working at Nabors, he also lied on his applications to Kaufmann, Global Marine Drilling Co., Inc. ("Global Marine"), and Chailland, Inc. ("Chailland"). TR. 126. Mr. Snear testified that he probably lied on the applications to all his employers after Nabors. TR. 125. Mr. Snear applied to Drennan on March 30, 2001, about seven months after his alleged injuries at Nabors. TR. 83-84. Mr. Snear admitted he lied on the Drennan application when he indicated that he was never injured on the job and had never received workers' compensation due to a work-related injury. TR. 86, 88.

Mr. Snear also admitted lying about his employment history on his application with Industrial Coatings. TR. 121-22. Although Mr. Snear had about 40 employers between 1990 and 2002, he had indicated that he worked for "Snear Contracting" from 1990 to 2002. TR. 121. He testified that he lied because he did not want Industrial Coatings to know about all his prior employers. TR. 122. Mr. Snear testified that he also lied when he indicated on his Industrial Coatings application that he did not have any disability or physical or mental condition that limited or restricted him in any way, that a doctor had never restricted his activities, and that he never had an accident or pain with his head, eyes, ear, hearing, neck, shoulders, arms, hands, fingers, upper back, chest, heart, lower back, legs, knees, ankles, feet, and toes. TR. 122-25. Mr. Snear explained that all his lies were said in order for him to go to work and take care of his family. TR. 87.

Mr. Snear testified that he underwent a physical evaluation test for Drennan on June 4, 2001, about nine months after his alleged Nabors accident. TR. 92. Regarding a health status questionnaire Mr. Snear completed in relation to that physical evaluation, Mr. Snear admitted to lying that (1) his general health was excellent, (2) that he had never experienced low back pain, upper back pain, neck back pain, pain radiating down the legs, pain radiating

down the arms, bladder control problems, nor bowel control problems, and (3) that he did not have muscle tightness or spasms in the back or neck. TR. 89-90. Mr. Snear also admitted lying on that questionnaire about (1) not having had a knee, neck, or back injury, (2) not having missed time from work due to an injury, disability, or illness, and (3) never having had a doctor restrict his activities. TR. 91-92.

Mr. Snear testified that his June 4, 2001 physical evaluation for Drennan lasted about one hour. TR. 142. Mr. Snear acknowledged that he was able to complete a three minute step test in which he was required to step up on a 12 inch platform 24 times per minute. TR. 92-93. Mr. Snear also testified that he was able to complete all the tasks relating to physical agility, including sitting, standing, standing with his trunk flexed 30 degrees for 60 seconds, reaching and grasping overhead, kneeling 60 seconds on each knee, squatting 60 seconds, crawling 10 feet, balancing on one leg for 30 seconds, performing a heel-toe walk for ten feet, climbing stairs, performing a vertical ladder climb, and walking. TR. 93. Mr. Snear acknowledged that he was able to lift 90 pounds safely in two consecutive repetitions with a 12 second rest and was able to lift 37 pounds twice over his head from the floor with a 12 second rest. TR. 94. Mr. Snear also acknowledged being able to carry 90 pounds a distance of 25 feet. TR. 94. Mr. Snear explained that he was in pretty good physical shape, despite being hurt. TR. 93-94.

Mr. Snear indicated that he assumed he could still do the physical tasks he performed in June 2001. TR. 95. When asked if he could perform the Nabors roustabout duties, Mr. Snear testified that he could try but did not know. TR. 95.

Terry Jackson

At the time of his testimony, Mr. Jackson was employed with Tetro Technologies. TR. 21. Mr. Jackson testified that he worked with Mr. Snear at Nabors in August of 2000, while Mr. Jackson was working for Nabors as a motorman. TR. 21-23. Although Mr. Jackson remembered Mr. Snear, Mr. Jackson testified that he did not remember any accident involving Mr. Snear in August of 2000. TR. 21-25.

Mr. Jackson remembered accidents from fifteen to twenty years ago, including a worker suffering a broken leg, a worker being struck in the back, and a worker's feet being cut by pipe. TR. 26. Mr. Jackson testified that he believed he would remember an incident in which a worker fell down in front of him and was injured. TR. 26. Mr. Jackson further testified that he thought he would remember an accident in which Mr. Snear was working with him and fell to the ground. TR. 27.

Ross McBryde

Mr. McBryde testified that he handles workers' compensation claims for Nabors. TR. 149. Mr. McBryde testified that he investigated the alleged August 30, 2000 accident by Mr.

Snear at Nabors. TR. 149. On November 20, 2001, Mr. McBryde spoke with Terry Jackson and Johnny Newport. TR. 150. Mr. McBryde testified that Mr. Jackson's testimony at the hearing was consistent with what Mr. Jackson had reported on November 20, 2001. TR. 150. According to Mr. McBryde, Mr. Jackson had indicated to him that he did not remember the accident nor witness the accident. TR. 152. Mr. McBryde indicated that Mr. Newport remembered the accident being reported but was not a witness to the accident itself. TR. 152-53. Mr. McBryde testified that he had not spoken to Zimbery Brown because Zimbery Brown was no longer employed with Nabors. TR. 150-51. Mr. McBryde had not tried to otherwise locate Zimbery Brown. TR. 150-52.

MEDICAL EVIDENCE

1. Testimony and Reports

Stephen J. Flood, M.D.

In a September 23, 1999 report, Dr. Flood indicated that Mr. Snear suffered an on-the-job injury on May 24, 1999 while working for Kaufmann as a laborer. RX-2, pp. 7, 16; RX-23, pp. 8-9. Dr. Flood indicated that Mr. Snear had been hit by a steel rebar from the top back of his left shoulder diagonally across to the back of his right hip. RX-2, pp. 7, 16-17; RX-23, pp. 8-9. According to Dr. Flood, Mr. Snear was initially treated for the Kaufmann accident by Dr. Gordon Nutik at Meadowcrest Hospital. RX-2, p. 7; RX-23, pp. 10-11. Mr. Snear visited Dr. Flood for further evaluation because of continuing pain in his neck, mid-back, and low back. RX-2, p. 7; RX-23, pp. 10-11.

Mr. Snear indicated to Dr. Flood that he had moderate neck pain that went in between the shoulder blades and into both shoulders. RX-2, pp. 7, 11-17; RX-23, pp. 8-10, 17-18. Mr. Snear described his mid-back and low back pain as severe. RX-2, pp. 7, 11-15, 16-17; RX-23, pp. 8-10, 17-18. Dr. Flood indicated that Mr. Snear had two prior spine injuries. RX-2, p. 7; RX-23, pp. 11-12. The first was an on-the-job injury in approximately 1985 in which Mr. Snear missed about one year from work. RX-2, p. 7; RX-23, pp. 11-12. The second was a motor vehicle accident in 1996 to his neck and back that caused him to miss about 6 months of work. RX-2, p. 7; RX-23, pp. 11-12.

Dr. Flood found that Mr. Snear appeared to have cervicothoracic and lumbar syndrome without significant radiculitis or radiculopathy as a result of the Kaufmann work injury. RX-2, p. 9; RX-23, p. 15. Dr. Flood also noted that Mr. Snear may have had a very mild pre-existing DISH syndrome,⁶ with very early manifestation of syndesmophyte formation in the lumbar spine. RX-2, p. 9; RX-23, p. 15. Dr. Flood also indicated that Mr. Snear probably had some pre-existing disc disease at C5-6, that he possibly had some pre-

⁶ DISH syndrome stands for disseminated idiopathic sclerosing hyperostosis.

existing disc disease at C4-5 and C6-7, and that it appeared Mr. Snear had some facet arthritis on the right at L5-S1. RX-2, p. 9; RX-23, p. 15.

Dr. Flood recommended that Mr. Snear undergo physical therapy with a special emphasis on exercise. RX-2, p. 9; RX-23, pp. 15-16. Dr. Flood indicated that he wanted an MRI performed of Mr. Snear's cervical spine and that he wanted to review an MRI of Mr. Snear's lumbar spine and a bone scan that were performed while Mr. Snear was under the care of Dr. Nutik. RX-2, p. 9; RX-23, p. 16. Dr. Flood also wanted to review Mr. Snear's medical records from his 1996 motor vehicle accident. RX-2, p. 9; RX-23, p. 16. Dr. Flood indicated that Mr. Snear was temporarily totally disabled for six weeks. RX-2, p. 9; RX-23, p. 16.

Dr. Flood again saw Mr. Snear on October 15, 1999, and indicated that Mr. Snear had been undergoing physical therapy. RX-2, p. 6; RX-23, p. 16. Dr. Flood reviewed the MRI of Mr. Snear's lumbar spine and agreed with the radiologist's finding that the results were essentially normal. RX-2, p. 6; RX-23, pp. 16-17. Dr. Flood indicated that Mr. Snear continued to be temporarily totally disabled from October 15, 1999, until November 26, 1999. RX-23, p. 17. Dr. Flood testified that his diagnosis had not changed from Mr. Snear's prior visit. RX-23, p. 17.

An MRI of Mr. Snear's cervical spine was performed on November 18, 1999, by Crescent City MRI. RX-2, p. 4; RX-19, pp. 2-3; RX-23, pp. 20-21. The radiologist, Thompson M. Dietz, reported that the MRI indicated a reversal of the usual cervical lordosis, which Dr. Flood testified was suggestive of the presence of some cervical spasms on the day of the study. RX-2, pp. 4-5; RX-19, pp. 2-3; RX-23, p. 21. The MRI also indicated a 3-4 millimeter broad-based posterior central paracentral bulge or protrusion of the C5-6 disc contributory to mild to moderate narrowing of the central canal, a finding Dr. Flood testified he would interpret more as a herniation. RX-2, pp. 4-5; RX-19, pp. 2-3; RX-23, pp. 21-22. Dr. Dietz also found comparatively earlier mild degenerative changes at the C3-4, C4-5, and C6-7 levels. RX-2, pp. 4-5; RX-19, pp. 2-3; RX-23, p. 21. Dr. Dietz also noted an incidental finding of cerebellar tonsillar ectopia. RX-2, p. 5; RX-19, pp. 2-3; RX-23, p. 21.

In a November 26, 1999 report, Dr. Flood indicated that Mr. Snear still had neck, mid-back, and low back pain. RX-2, p. 3; RX-23, p. 18-20. Dr. Flood again reviewed the MRI of Mr. Snear's lumbar spine and reiterated that he believed the MRI contained some signs of DISH syndrome with no herniated disc. RX-2, p. 3; RX-23, p. 19. Dr. Flood opined that Mr. Snear was permanently disabled from the heavy manual labor he had been performing. RX-2, p. 3; RX-23, p. 19.

Dr. Flood last saw Mr. Snear on January 5, 2000. RX-2, p. 2; RX-23, pp. 22, 24. Dr. Flood reviewed Mr. Snear's functional capacity evaluation and indicated that Mr. Snear was permanently disabled from heavy work. RX-2, p. 2; RX-23, pp. 23-24. Dr. Flood opined that Mr. Snear was relegated to at most medium work. RX-2, p. 2; RX-23, pp. 23-24. Dr.

Flood indicated Mr. Snear had reported left leg symptoms and his left leg occasionally going out on him. RX-2, p. 2; RX-23, p. 23. Dr. Flood allowed Mr. Snear to return to work within the limits of his FCE, along with additional restrictions from walking on uneven or slippery surfaces and climbing ladders. RX-2, p. 2; RX-23, p. 23. Dr. Flood testified that these restrictions were permanent physical restrictions for Mr. Snear. RX-23, p. 24.

Dr. Flood testified that he had not had contact with Mr. Snear nor any of Mr. Snear's medical records since Mr. Snear's last visit on January 5, 2000. RX-23, p. 27. Because he had not evaluated Mr. Snear in about three years, Dr. Flood declined to comment on any increase, decrease, or continuation of Mr. Snear's disability. RX-23, p. 25.

M. Christine Webster, M.D.

Mr. Snear was first treated by Dr. Webster on September 6, 2000, regarding his August 30, 2000 fall at Nabors. RX-9, p. 17. Mr. Snear complained of pain in his back, both knees, and both elbows. RX-28, p. 7. Dr. Webster diagnosed Mr. Snear with a cervical strain, lumbar strain, bilateral elbow and knee contusions, left shoulder strain, and a forearm strain bilaterally. RX-9, p. 18; RX-28, p. 10. Mr. Snear continued to complain of pain and was treated through November 22, 2000, at which time Dr. Webster opined that his examination was within normal limits and no other appointment was made for him. RX-9, pp. 18-19. Dr. Webster opined that given Mr. Snear's history and physical examination findings, the injuries he suffered more probably than not resulted from his Nabors accident. RX-9, p. 19, 24, 28.

Dr. Webster indicated in her report that Mr. Snear's past medical history was unremarkable. RX-9, pp. 6, 18. Dr. Webster testified that when she treats a patient, her interviewing nurse questions the patient about any similar problems in the past, including previous accidents or injuries. RX-28, p. 8. When no similar problems from the past are reported, the history is unremarkable and the nurse indicates "none reported." RX-9, p. 6; RX-28, p. 8. Dr. Webster testified that she found only subjective evidence of Mr. Snear's symptoms and that her opinion that Mr. Snear's symptoms more likely than not resulted from his August 30, 2000 accident was based on the unremarkable history reported by Mr. Snear. RX-28, pp. 10-12. After being provided a summary of Mr. Snear's medical history, including his 1985 back injury that caused him to miss almost one year of work, his 1994 neck and back injury that caused him to miss about six months of work, his left leg giving out, and his 1999 accident that caused him neck, mid-back, and low back pain, Dr. Webster opined that only Mr. Snear's elbow, knee, and forearm symptoms were related to his August 2000 accident. RX-28, p. 14.

Dr. Webster indicated that Mr. Snear returned on January 16, 2001, complaining of pain in his left shoulder with spasms in his fingers. RX-9, p. 24. Dr. Webster prescribed therapy and recommended that Mr. Snear be evaluated by a neurosurgeon. RX-9, p. 24.

Mr. Snear was next seen on March 6, 2001, at which time he indicated that he tried working at a new job. RX-9, p. 24. However, Mr. Snear reported to Dr. Webster that his left leg gave out, causing him to fall and requiring him to be rescued from a hole. RX-9, p. 24. Dr. Webster indicated that conservative care was continued pending an evaluation of Mr. Snear by a neurosurgeon. RX-9, p. 24.

Dr. Webster indicated that Mr. Snear returned to see her on May 3, 2001. RX-9, p. 28. At that time, Mr. Snear reported that a neurosurgeon had indicated he had bad discs in his neck and ligament damage in his left arm. RX-9, p. 28. According to Dr. Webster, Mr. Snear was considering neurosurgery and would consult an orthopedic surgeon regarding his left arm symptoms. RX-9, p. 28. Mr. Snear did not have complaints of pain but indicated that his left knee was giving out. RX-9, p. 28.

Dr. Webster indicated that during her examinations of Mr. Snear, she did not observe any objective medical evidence of an injury. RX-28, pp. 17-18. Dr. Webster testified that she reported only Mr. Snear's subjective complaints and that her physical restrictions for Mr. Snear were based on his subjective complaints of pain. RX-28, pp. 17-18, 22.

John C. Steck, M.D.

Mr. Snear was first examined by Dr. Steck on May 11, 2001. RX-13, p. 3; RX-26, p. 6. Mr. Snear complained of pain in his low cervical spine that radiated into both shoulders, pain that radiated down his left arm into his hand, and his left leg giving out. RX-13, p. 3; RX-26, pp. 6-8. Dr. Steck indicated that Mr. Snear reported that his symptoms began after his work accident at Nabors on August 30, 2000. RX-13, p. 3; RX-26, pp. 6-7. Mr. Snear indicated to Dr. Steck that he did not have similar symptoms prior to the Nabors accident and that he had fully recovered from a 1988 motor vehicle accident and his 1999 Kaufmann accident. RX-13, p. 3; RX-26, pp. 6-7.

Dr. Steck reviewed Mr. Snear's April 11, 2001 MRI of his cervical spine and opined that Mr. Snear did not have a cervical disc herniation nor anything else that was causing significant neurocompression or would indicate surgery. RX-13, p. 4; RX-26, p. 11. Dr. Steck testified that he did not see anything in the film that was consistent with an acute traumatic injury and that the MRI indicated only basic degeneration due to the aging process. RX-26, pp. 11, 25-26. Dr. Steck testified that Mr. Snear's physical exam was normal, and Dr. Steck concluded that Mr. Snear was having symptoms of cervical spondylosis with a radiculopathy. RX-13, p. 4; RX-26, pp. 13-14. Dr. Steck recommended conservative care for Mr. Snear initially, with potential exploration into other treatments later on. RX-13, p. 4; RX-26, p. 14.

Mr. Snear again returned to see Dr. Steck on January 16, 2003. RX-13, p. 1; RX-26, p. 19. Dr. Steck indicated that Mr. Snear complained of neck pain, headaches, and his left leg intermittently giving out. RX-13, p. 1; RX-26, p. 20. After examining Mr. Snear, Dr.

Steck opined that Mr. Snear had a cervical pain syndrome, i.e., ongoing neck pain, with headache without radiculopathy. RX-13, p. 2; RX-26, pp. 21, 34-35. Dr. Steck testified that he could not determine whether Mr. Snear's headaches were related to his cervical condition. RX-26, p. 33. Dr. Steck testified that his evaluations found no objective evidence of any acute injury or aggravation of Mr. Snear's underlying degenerative condition. RX-26, pp. 21, 35-36. Dr. Steck indicated that Mr. Snear had no signs of spinal cord dysfunction or nerve root dysfunction. RX-13, p. 2. Dr. Steck testified that even if Mr. Steck had a disc herniation, he would not be a candidate for surgery because the imaging evidence was not sufficient to link the potential source of his pain with his symptoms. RX-26, pp. 15-16, 27-28.

Dr. Steck testified that Mr. Snear's 1999 and 2001 cervical MRIs were very similar and that there was no objective medical evidence of a worsening in Mr. Snear's condition between the 1999 and 2001 cervical MRIs. RX-26, p. 12. Dr. Steck testified that he also reviewed Mr. Snear's January 16, 2003 MRI of his cervical spine. RX-26, p. 21. He testified that the study was a fairly similar to Mr. Snear's previous cervical MRIs, with some additional degenerative changes at C6-7. RX-26, pp. 21-22. Dr. Steck testified that the January 16, 2003 MRI likewise contained no evidence of any acute trauma, spinal cord compression, or significant nerve root compression. RX-26, p. 22.

After being provided a summary of Mr. Snear's medical history, including his 1985 back injury that caused him to miss almost one year of work, his 1994 neck and back injury that caused him to miss about six months of work, his left leg giving out, and his 1999 accident that caused him neck, mid-back, and low back pain, Dr. Steck opined that if the history were all true, the August 30, 2000 accident was at most a minor aggravation of a pre-existing problem. RX-26, pp. 8-10.

Joseph L. Shine, Jr., P. T.

Mr. Shine testified that he is a licensed physical therapist, received his degree from the LSU Medical Center, and has been practicing for 8 years. RX-27, pp. 5-6. On June 4, 2001, Mr. Shine conducted a pre-employment physical evaluation of Mr. Snear on behalf of Drennan. RX-5, pp. 82-87; RX-27, p. 7. Mr. Shine testified that this pre-employment evaluation is different from a functional capacity evaluation in that the pre-employment evaluation is a general evaluation to determine whether a person meets the demands of a job while a functional capacity evaluation is more comprehensive, more focused on a specific injury and level of functioning, and is of a longer duration than a pre-employment evaluation. RX-27, pp. 44-46. Mr. Shine testified that the evaluation administered to Mr. Snear typically takes about one hour, including 10 to 15 minutes of paperwork. RX-27, pp. 42, 44.

In a health status questionnaire relating to this evaluation, Mr. Snear indicated that he was in excellent health and that he was not taking any medication. RX-5, pp. 95-97; RX-27, p. 10. Mr. Snear also indicated that he had never experienced any health problems,

including: low back pain, upper back pain, neck pain, pain radiating down his leg(s), pain radiating down his arm(s), muscle tightness or spasms in his back, muscle tightness or spasms in his neck, locking up of his back, joint pain or stiffness, pins and needles sensations in any part of his body, the need to change positions often to relieve discomfort, pain in his calves while walking, chest pains, and unusual weakness in his arms, hands, or legs. RX-5, pp. 95-97; RX-27, pp. 10-12.

Mr. Shine testified that he went over these responses with Mr. Snear, including verifying that Mr. Snear never had any back and neck injuries, that he had never missed work due to a significant injury, and that he was not in any type of discomfort before the physical examination. RX-27, pp. 16-17, 19-20. Mr. Shine testified that after he verified that Mr. Snear understood the questionnaire and did not want to change any of his responses, Mr. Shine conducted the physical examination. RX-27, p. 18.

According to the pre-employment evaluation report, Mr. Snear received a maximum score regarding his back strength, fell within normal limits regarding his grip strength, and received a rating near normal limits with respect to his flexibility. RX-5, p. 83; RX-27, pp. 24-27. Although Mr. Snear tested within normal limits in his extremity range of motion tests, Mr. Shine noticed a slight decrease in the range of motion in Mr. Snear's left shoulder. RX-5, p. 83; RX-27, pp. 21, 27-28. Mr. Shine testified that Mr. Snear explained that he had fallen and hurt his shoulder when he was 15 years old but that the injury was not significant. RX-5, p. 82; RX-27, p. 21.

Mr. Shine indicated that Mr. Snear's spinal range of motion was within normal limits, except for his cervical extension, i.e., extension of his neck backwards, which was in the lower end of the range. RX-5, p. 83; RX-27, pp. 29-31. However, Mr. Snear's cervical extension score did not raise a red flag with Mr. Shine regarding any neck problems. RX-27, pp. 30-31, 33. Mr. Shine indicated the results of Mr. Snear's lumbar movement tests were within normal limits. RX-5, p. 83; RX-27, p. 31. Mr. Snear's neurological examination also produced normal results. RX-5, p. 84; RX-27, p. 32.

According to Mr. Shine, Mr. Snear was capable of sitting, standing, standing with his trunk flexed at 30 degrees for 60 seconds, reaching and grasping overhead, kneeling for 60 seconds on each knee, squatting for 60 seconds, crawling ten feet, balancing on one leg for 30 seconds, performing a heel-toe walk for 10 feet, climbing stairs, vertical ladder climbing, and walking. RX-5, p. 85; RX-27, p. 36. Mr. Snear was able to lift 90 pounds from the floor to his waist safely for two consecutive repetitions, was able to lift 20 pounds safely over his head from the floor for two consecutive repetitions, and was able to lift and carry 90 pounds at waist level safely for 25 feet. RX-5, p. 85; RX-27, pp. 38-39. Mr. Shine testified that Mr. Snear did not complain of pain nor demonstrate any problems while performing these tasks. RX-5, p. 87; RX-27, pp. 36-37, 41-42, 46-49.

Mr. Shine testified that he had no significant findings regarding Mr. Snear's back, neck, or left shoulder and that his only significant recommendation was that Mr. Snear should work on his hamstring flexibility. RX-27, p. 43. According to Mr. Shine, Mr. Snear was able to perform the job duties of a laborer. RX-27, p. 40.

Bradley J. Bartholomew, M.D.

Dr. Bartholomew first saw Mr. Snear on October 9, 2001, through a referral from Dr. Toussaint Leclercq upon Dr. Leclercq's retirement. RX-24, pp. 5-6. Dr. Bartholomew indicated that Mr. Snear was injured at work on August 30, 2000, when he fell and landed on his elbows. RX-6, p. 13; RX-24, pp. 6-7. Dr. Bartholomew indicated that Mr. Snear complained of constant neck pain that went through his left upper extremity to his fingers and through his right upper extremity to his wrist. RX-6, p. 13; RX-24, pp. 6-7. Dr. Bartholomew indicated that Mr. Snear had tingling at times in his left upper extremity and that his left upper extremity felt weak. RX-6, p. 13; RX-24, pp. 6-7. According to Dr. Bartholomew's report, Mr. Snear had constant low back pain that went through his left lower extremity to his foot. RX-16, p. 13; RX-24, pp. 6-7. Dr. Bartholomew also reported that Mr. Snear's left lower extremity had occasionally given out and caused Mr. Snear to fall. RX-16, p. 13; RX-24, pp. 6-7.

With respect to Mr. Snear's past medical history, Dr. Bartholomew indicated that Mr. Snear had been struck across his neck and back in 1999. RX-6, p. 13; RX-24, pp. 7-8. Dr. Bartholomew reported that Mr. Snear saw Dr. Flood and the pain resolved without treatment. RX-6, p. 13; RX-24, pp. 7-8. Dr. Bartholomew indicated that an MRI scan on April 11, 2001, depicted a herniation in that Mr. Snear's C5-6 disc was larger than his C6-7 disc. RX-6, p. 13; RX-24, pp. 8-9.

Following the October 9, 2001 visit, Dr. Bartholomew next examined Mr. Snear on January 15, 2002. RX-6, p. 9; RX-24, p. 10. Dr. Bartholomew indicated that Mr. Snear continued with neck pain to both shoulders but no longer had upper extremity pain, weakness, or numbness. RX-6, p. 9; RX-24, p. 10. Mr. Snear continued also with low back pain that went through his left lower extremity to his foot, but Mr. Snear no longer had weakness or numbness there. RX-6, p. 9; RX-24, p. 10. Dr. Bartholomew indicated that he would not recommend surgery for Mr. Snear because Mr. Snear did not have any neurological deficit or upper extremity pain and because Mr. Snear reported that his back was not hurting enough for surgery. RX-6, p. 9; RX-24, pp. 10-11.

Dr. Bartholomew's next and final visit with Mr. Snear took place on March 25, 2002. RX-6, p. 4; RX-24, p. 11. Dr. Bartholomew indicated that Mr. Snear had been injured again on February 26, 2002, when cutting bands were dropped on his lower back. RX-6, p. 4; RX-24, pp. 11-12. According to Dr. Bartholomew, Mr. Snear reported that his neck pain was worse than before the February 26, 2002 injury, with pain going down his left upper extremity and varying numbness in all his fingers. RX-6, p. 4; RX-24, p. 12. Dr.

Bartholomew indicated that Mr. Snear's back pain was also worse. RX-6, p. 4; RX-24, p. 12. Dr. Bartholomew recommended a repeat MRI to determine whether there was a worsening of his neck injury as the result of the new injury on February 26, 2002. RX-6, p. 4; RX-24, p. 13. However, Dr. Bartholomew testified that as a matter of comparison, the difference in Mr. Snear's symptoms on January 15, 2002, compared to his symptoms after the new injury indicates that Mr. Snear clearly had an aggravation of his neck and back conditions. RX-24, pp. 17-20.

Dr. Bartholomew indicated that his assessment of Mr. Snear's physical restrictions and his recommendations for treatment would depend on the results of a new MRI scan or imaging study. RX-24, pp. 21-23.⁷ Without the benefit of a new MRI scan, Dr. Bartholomew testified he would recommend that Mr. Snear avoid repetitive flexion/extension with his neck, using his arms in work above the shoulders involving more than 20 pounds, and lifting more than 25 pounds on a repetitive basis. RX-24, pp. 21-22. Dr. Bartholomew testified that his opinion was limited to Mr. Snear's neck condition and that he would defer treatment of Mr. Snear's left shoulder to an orthopaedist. RX-24, pp. 21, 32.

Dr. Bartholomew testified that he related Mr. Snear's symptoms on October 9, 2001, to Mr. Snear's alleged Nabors accident on August 30, 2000. RX-24, pp. 13-14. However, Dr. Bartholomew testified that he had not reviewed Mr. Snear's November 18, 1999 cervical MRI and that he was unaware that an MRI had been performed in relation to Mr. Snear's 1999 injury. RX-6, p. 13; RX-24, pp. 8, 16-17. Dr. Bartholomew also had not reviewed any of Mr. Snear's medical records prior to August 30, 2000, including Dr. Flood's records and testimony. RX-24, pp. 16-17. Dr. Bartholomew was unaware that Dr. Flood had indicated Mr. Snear had a cervical herniation as a result of the 1999 accident. RX-24, pp. 16-17. Dr. Bartholomew testified that Mr. Snear had also not disclosed to him that Mr. Snear had severe neck pain extending to both shoulders, mid and low back pain, headaches, and giving way of the left leg before August 30, 2000. RX-24, p. 14.

After reviewing Mr. Snear's November 18, 1999 cervical MRI at his deposition, Dr. Bartholomew agreed with Dr. Flood that Mr. Snear had a herniation prior to his Nabors accident. RX-24, pp. 29-30. While indicating that he would have to see the November 18, 1999 and April 11, 2001 MRIs side-by-side to compare the sizes of the herniations they depict, Dr. Bartholomew nonetheless opined that Mr. Snear's August 30, 2000 Nabors accident caused an aggravation of a pre-existing condition. RX-24, pp. 30-31.

⁷ Dr. Bartholomew's deposition took place on January 6, 2003, prior to the last MRI of Mr. Snear's cervical spine, which took place on January 16, 2003. RX-24; RX-47. There is no evidence of any review by Dr. Bartholomew of Mr. Snear's January 16, 2003 MRI.

2. Reports

Norman D. Ott, M.D.

In a January 13, 1995 report, Dr. Ott indicated that he examined Mr. Snear for chest, neck, and lower back pain resulting from a car accident on December 6, 1994. RX-4, p. 16. Dr. Ott found that Mr. Snear had suffered: (1) a cervical/trapezius strain, (2) a thoracolumbar strain, and (3) an impact to the chest. RX-4, p. 17. Dr. Ott gave Mr. Snear medication and heat treatment for his neck, back, and left pectoral area and allowed Mr. Snear to return to work using caution in exertional activities. RX-4, p. 17.

In a March 10, 1995 report, Dr. Ott summarized Mr. Snear's visits on January 24, 1995, February 6, 1995, and March 9, 1995. RX-4, pp. 14-15. On January 24, 1995, Mr. Snear complained that his neck and back pain had worsened. RX-4, p. 14. Mr. Snear also complained that pain was radiating down his left leg and that his left leg gave out. RX-4, p. 14. Dr. Ott ordered an MRI of Mr. Snear's lumbar spine as well as an orthopedic evaluation. RX-4, p. 14.

On February 6, 1995, Mr. Snear reported that his neck and back pain had improved and that his radiating pain had resolved. RX-4, p. 14. Dr. Ott indicated that he felt Mr. Snear was somewhat inconsistent and perhaps was anticipating pain. RX-4, p. 14.

On March 9, 1995, Mr. Snear reported no symptoms, and Dr. Ott found Mr. Snear to be within normal limits upon examination. RX-4, p. 15. Dr. Ott discharged Mr. Snear. RX-4, p. 15. Mr. Snear never had an MRI performed nor saw an orthopaedist before this discharge. RX-4, pp. 14-15.

Dr. Ott again examined Mr. Snear on September 6, 2000, with respect to Mr. Snear's alleged August 30, 2000 injury at Nabors. RX-4, p. 6. Mr. Snear reported to Dr. Ott that he had tripped and fell forward, striking both his elbows as he tried to break his fall. RX-4, pp. 5-6, 9. Dr. Ott indicated that Mr. Snear had constant pain in his neck that increased with motion after maintaining one position too long, that he had a somewhat sore right calf with no bruising or abrasion, and that he had constant back pain down his entire back bilaterally that increased with motion. RX-4, p. 6. Dr. Ott opined that Mr. Snear suffered: (1) a cervical/trapezius strain, (2) a lumbar strain, and (3) a strained right calf. RX-4, p. 7. Dr. Ott indicated that his findings did not correlate well with Mr. Snear's symptoms. RX-4, p. 7. Dr. Ott requested an MRI of Mr. Snear's lumbar spine and advised Mr. Snear to seek an orthopedic evaluation. RX-4, p. 7. Dr. Ott gave Mr. Snear prescription medicine for pain and told Mr. Snear he could return to work, stretching frequently and being careful with any lifting and pulling. RX-4, p. 7.

In a January 23, 2001 report, Dr. Ott indicated that Mr. Snear had not returned to his office since his first September 6, 2000 visit for any further follow-up evaluations. RX-4, p. 4.

Gordon P. Nutik, M.D.

Dr. Nutik examined Mr. Snear on June 2, 1999, regarding Mr. Snear's May 24, 1999 accident at Kaufmann. RX-14, p. 9. Mr. Snear complained of mid-back and lower back pain. RX-14, p. 9. According to Dr. Nutik's report, Mr. Snear had pain in his left shoulder and the bottom of the right side of his low back. RX-14, p. 9. Mr. Snear denied neck pain as well as any numbness or pain radiating down to his lower extremities. RX-14, p. 9. Mr. Snear was diagnosed with a soft tissue strain about the neck, mid-back, and low back. RX-14, p. 11. Dr. Nutik anticipated this strain would resolve with conservative care. RX-14, p. 11. Dr. Nutik recommended physical therapy and indicated that Mr. Snear was capable of returning to light work. RX-14, pp. 11, 31.

Dr. Nutik next examined Mr. Snear on June 16, 1999. RX-14, pp. 14-15. Dr. Nutik indicated that Mr. Snear continued to have primarily low back pain as well as mid-back pain. RX-14, p. 15. Dr. Nutik indicated that he anticipated the soft tissue injury would have improved by that time and that Mr. Snear still exhibited inconsistencies concerning the findings about his lower back region. RX-14, p. 15. Dr. Nutik indicated that Mr. Snear should continue at physical therapy. RX-14, p. 15.

On June 23, 1999, an MRI of Mr. Snear's lumbar spine was performed by Dr. T. Lamar Teaforde at Crescent City MRI. RX-14, p. 24; RX-19, p. 4. The results indicated that Mr. Snear had mild hypertrophic spondylosis change of the L4 and L5 levels, with partial narrowing of the lateral spinal gutter and neural foramen on the left. RX-14, p. 24; RX-19, p. 4. Mr. Snear had no disc herniation, fracture, or subluxation. RX-14, p. 24; RX-19, p. 4.

Dr. Nutik again examined Mr. Snear on June 30, 1999. RX-14, p. 13. Dr. Nutik reviewed the June 23, 1999 MRI of Mr. Snear's lumbar spine and indicated that the MRI revealed no evidence of a disc herniation. RX-14, p. 13. Dr. Nutik opined that Mr. Snear continued to show inconsistencies upon clinical examination, and Dr. Nutik ordered a functional capacity evaluation for Mr. Snear following two more weeks of physical therapy. RX-14, p. 13. Dr. Nutik indicated that Mr. Snear's physical therapy note from June 29, 1999, indicated that his physical therapy progress was being limited by decreased attendance and that Mr. Snear had shown signs of symptom magnification. RX-14, p. 13; see also RX-15, p. 12.

On July 7, 1999, Mr. Snear underwent a whole body nuclear bone scan performed by Dr. David B. Chalpin at Diagnostic Imaging Services. RX-14, p. 26. Dr. Chalpin indicated

that the study was normal, with only slight asymmetry at the upper sacrum likely secondary to a segmentation anomaly at S1. RX-14, p. 26.

In a July 27, 1999 report, Dr. Nutik indicated that Mr. Snear did not keep his July 21, 1999 appointment. RX-14, p. 8. Dr. Nutik indicated that he had reviewed Mr. Snear's July 7, 1999 whole body scan and felt the study was within normal limits. RX-14, p. 8. Dr. Nutik indicated that Mr. Snear was at maximum medical improvement concerning his low back and that he was capable of at least medium level work. RX-14, p. 8.

Dr. Nutik indicated that he performed an independent medical examination of Mr. Snear on November 15, 1999. RX-14, p. 3. Dr. Nutik indicated that Mr. Snear had suffered soft tissue strains about the neck, upper mid-back, and lower back. RX-14, p. 6. Dr. Nutik opined that Mr. Snear's neck complaints had resolved under his care and that there were no objective findings to indicate Mr. Snear would have a permanent disability related to the Kaufmann accident. RX-14, p. 6. Dr. Nutik indicated that Mr. Snear's neck, mid-back, and low back injuries should have resolved with conservative treatment and that Mr. Snear had reached maximum medical improvement on June 30, 1999. RX-14, p. 6. Dr. Nutik indicated that Mr. Snear was capable of performing light work but that determining Mr. Snear's ultimate level of work was difficult to assess because Mr. Snear was not showing maximal cooperation at the time of his evaluations. RX-14, p. 6.

In a February 16, 2000 report, Dr. Nutik indicated that he concurred with the physical findings of Mr. Snear's functional capacity evaluation on December 14-15, 1999. RX-14, p. 2. Dr. Nutik also concurred with the conclusion that Mr. Snear was capable of at least medium work. RX-14, p. 2.

Jacqueline Cleggett-Lucas, M. D.

Dr. Cleggett-Lucas examined Mr. Snear on July 26, 1999, with respect to his Kaufmann accident. RX-16, p. 8. Dr. Cleggett-Lucas indicated that Mr. Snear had a thoracic lumbar strain/contusion, a cervical strain, and a history of blunt trauma. RX-16, p. 9. In a November 30, 1999 report, Dr. Cleggett-Lucas indicated that she was unable to formulate an opinion as to Mr. Snear's status because he had not returned to her office since August 10, 1999. RX-16, p. 15.

Mark K. Walker, D.C.

In an August 30, 1999 report, Dr. Walker indicated that he evaluated Mr. Snear with respect to Mr. Snear's Kaufmann injury. RX-18, p. 11. Dr. Walker diagnosed Mr. Snear with a cervical sprain/strain, a thoracic sprain/strain, a lumbar sprain/strain, and myofascial headaches. RX-18, p. 11. Dr. Walker opined that Mr. Snear was temporarily totally disabled from August 30, 1999 to October 14, 1999 and recommended chiropractic care with

therapeutic modalities. RX-18, p. 11. In a December 10, 1999 note, Dr. Walker indicated that Mr. Snear's left leg had been giving out and that Mr. Snear had fallen. RX-18, p. 14.

Riverside Physical Therapy

Mr. Snear underwent a functional capacity evaluation on December 14-15, 1999, with respect to his May 24, 1999 injury at Kaufmann. RX-3, p. 2. The report indicates that Mr. Snear did not give a maximal effort and was magnifying his symptoms. RX-3, p. 2. According to the report, Mr. Snear was capable of medium work and lifting and carrying of 28 to 35 pounds. RX-3, p. 2. The report indicates that several inconsistencies were noted in Mr. Snear's pain questionnaires as well as functional testing procedures. RX-3, p. 8. The report concluded that with proper training and resolution of his self-limiting behaviors, Mr. Snear had a good potential for improving his physical demand level. RX-3, p. 8.

George G. Willis, M.D.

Dr. Willis performed x-rays of Mr. Snear's right and left shoulders on September 14, 2000. RX-10, p. 1. According to the results, Mr. Snear's shoulders were both normal. RX-10, p. 1.

Toussaint Leclercq, M.D.

Mr. Snear was evaluated by Dr. Leclercq of the LSU Department of Neurosurgery on March 14, 2001. RX-12, p. 6. Dr. Leclercq indicated that Mr. Snear accidentally tripped and fell onto his elbows and left shoulder on August 30, 2000, while working offshore as a roustabout. RX-12, p. 6. Dr. Leclercq indicated that Mr. Snear since that time had been complaining of numbness and tingling in his left arm and leg. RX-12, p. 6. Dr. Leclercq also noted that Mr. Snear's left leg had given out on him and caused him to fall. RX-12, p. 6. Dr. Leclercq indicated that he completed a neurological exam which was entirely within normal limits, except for a moderate amount of spasm in the left paravertebral muscles and left trapezius muscle. RX-12, p. 6. Dr. Leclercq ordered MRIs of Mr. Snear's cervical spine and left shoulder for further evaluation. RX-12, p. 6.

On April 11, 2001, Dr. Daniel H. Johnson, Jr. of Clearview Medical Imaging conducted MRIs of Mr. Snear's cervical spine and left shoulder. RX-12, pp. 3-5; RX-48, pp. 6-8. With respect to the results of the cervical spine MRI, Dr. Johnson found that: (1) the C2-3 and C7-T1 discs were within normal limits, (2) there was posterior bulging of the C3-4 disc of less than 1 mm, (3) there was no significant abnormality of the C4-5 disc, (4) there was broadly based posterior and slightly downward herniation of the C5-6 disc, and (5) there was broadly based posterior and slightly downward bulging of the C6-7 disc. RX-12, p. 4; RX-48, pp. 6-8. With respect to the results of Mr. Snear's left shoulder MRI, Dr. Johnson found that: (1) there was suspicion of a tear of the anterior glenoid labrum, (2) there was tendinosis at the posterior aspect of the supraspinatus muscle tendon, (3) there was

suspicion of tiny inferior surface partial thickness tear at the lateral aspect of the supraspinatus muscle tendon, and (4) there was a peculiar scalloped area at the posterolateral aspect of the superior portion of the humeral head of uncertain etiology. RX-12, p. 5; RX-48, pp. 6-8.

Upon review of the MRIs on April 18, 2001, Dr. Leclercq indicated that he agreed Mr. Snear had a herniated disc at C5-6. RX-12, p. 2. Dr. Leclercq also indicated that Mr. Snear would be referred to an orthopedic surgeon based on the results of his left shoulder MRI. RX-12, p. 2.

Earl J. Rozas, M. D.

Dr. Rozas evaluated Mr. Snear on February 27, 2002, concerning Mr. Snear's work injury at EBE on February 26, 2002. RX-17, p. 3. Dr. Rozas indicated that Mr. Snear was struck on his back, primarily in the lower region, when crimp cutters were dropped on him from above. RX-17, p. 3. Dr. Rozas opined that Mr. Snear sustained a contusion of the lumbar muscle area and that there was no evidence of a pinched nerve or ruptured disc. RX-17, p. 3. Dr. Rozas opined that Mr. Snear would be able to return to work after a two day absence. RX-17, p. 3.

William G. Armington, M.D.

Dr. Armington of Metairie Imaging conducted an MRI of Mr. Snear's cervical spine on January 16, 2003. RX-47, pp. 1-2. The results of the MRI indicated that: (1) there was reversal of the normal cervical lordosis, (2) there was a central herniated nucleus pulposus of 3 millimeters at C6-7 not contacting the ventral surface of the adjacent cervical spinal cord, (3) there was neural foraminal stenosis on the right at C4-5 and C5-6 and on the left at C5-6, as a consequence of a diffuse bulge of the annulus fibrosis with marginal osteophyte formation, and (4) there were low-lying cerebellar tonsils, which were seen as a normal variant. RX-47, p. 2.

III. VOCATIONAL EVIDENCE

1. Testimony and Reports/Records

Larry Stokes, Ph. D.

Mr. Stokes is a vocational rehabilitation expert who met with Mr. Snear on November 8, 2002, to determine Mr. Snear's rehabilitation potential, employability, and wage-earning capacity. TR. 153-54; RX-20, p. 1. Mr. Stokes ascertained information about Mr. Snear's background, including his age, physical characteristics, educational background, work history, and medical history. TR. 154; RX-20, pp. 1-10. Mr. Stokes also administered vocational testing to Mr. Snear. RX-20, pp. 6-7. According to his December 16, 2002 report, Mr. Stokes had reviewed medical records from Dr. Bartholomew, Dr. Steck, Dr. Leclercq, Dr. Cleggett-Lucas, Dr. Walker, Dr. Flood, Crescent City MRI, Crescent City Physical Therapy, R.S. Medical, Allied Adult & Child Clinic, and Health South. RX-20, pp. 1-2. Mr. Stokes also reviewed Mr. Snear's employment records with Nabors and Mr. Snear's functional capacity evaluation from December 14-15, 1999. RX-20, pp. 1-2. Mr. Stokes indicated that potential alternate jobs for Mr. Snear included a dishwasher, delivery driver, gate guard, bench assembler, courier, and hand packager. RX-20, p. 9. The wages for these jobs ranged from \$5.57 to \$11.24 per hour. RX-20, p. 9.

Mr. Stokes testified that he conducted a labor market survey regarding Mr. Snear. TR. 154-55. Mr. Stokes indicated that he found openings for full-time janitor positions at Ridgewood Prep and Serv-All Services, Inc. TR. 155. In addition, Mr. Stokes identified an order selector position with Imperial Trading Company, an unarmed security guard position with Vinson Guard Service, and a food station attendant position with Marriott Hotel. TR. 156. Mr. Stokes also identified dishwasher positions with Palace Truck Stop, D'Martino's Restaurant, and Catalino's Restaurant. TR. 156-57. Mr. Stokes testified that Mr. Snear was qualified for these openings by virtue of his vocational profile, including his age, education, experience, work history, skills, and physical capabilities. TR. 157-58.

In a January 30, 2003 report, Mr. Stokes indicated that he received additional records, including medical records from the LSU Health Sciences Center, Tulane University Medical Center, Dr. Rozas, and Dr. Ott. RX-20, p. 11. Mr. Stokes also received an updated report from Dr. Steck, Dr. Bartholomew's deposition of January 6, 2003, Dr. Flood's deposition of December 19, 2002, and more employment records. RX-20, p. 11. Mr. Stokes indicated little change in his opinion of Mr. Snear's potential wages, which he indicated ranged from \$5.15 to \$11.24 per hour. RX-20, p. 13.

In a February 13, 2003 follow-up report, Mr. Stokes indicated that he had reviewed Mr. Snear's employment records from Industrial Coatings and the deposition of Charles Monroe, Jr., the field operations manager for Industrial Coatings. RX-20, p. 15. Based on Mr. Snear's testimony, the pre-employment physical evaluation of Drennan, and Mr.

Monroe's testimony and description of the physical requirements of Mr. Snear's job at Industrial Coatings, Mr. Stokes opined that Mr. Snear could return to his previous occupation as a roustabout. T. 158-59, 166; RX-20, p. 16. Mr. Stokes opined that if Mr. Snear is capable of performing his job at Industrial Coatings, then he also is able to do the job of a roustabout. TR. 168. Mr. Stokes explained that the duties of a roustabout fell within the same heavy level strength demand as Mr. Snear's work with Industrial Coatings. RX-20, p. 16.

Although Mr. Stokes did not know Mr. Snear's exact duties as a roustabout at Nabors, Mr. Stokes testified that his 20 years of experience as a vocational rehabilitation specialist had made him familiar with the day-to-day duties of a roustabout. TR. 161, 167. Mr. Stokes testified that the physical demand level of a roustabout offshore was very heavy, defined as lifting up to 100 pounds frequently or over 100 pounds throughout the day. TR. 158. Mr. Stokes testified that loading thirty 100-pound bags of sand into a sandblasting machine for 50% of one's work time, as Mr. Snear was doing at Industrial Coatings, was heavier work than the duties of a roustabout. TR. 168. Mr. Stokes also testified, however, that a roustabout job typically requires 84-hour alternating work weeks and that he would defer to a doctor to determine whether Mr. Snear is able to work an 84-hour week as opposed to a 40-hour week. TR. 164.

Mr. Stokes testified that several companies in the Gulf of Mexico reported openings for a roustabout, including Toddco Offshore Drilling Company, Global Marine, and Danos & Curole. TR. 159. Mr. Stokes indicated that employment as a roustabout should continue to be available should Mr. Snear choose to return to work in that capacity. RX-20, p. 16. Mr. Stokes testified that there are about 30 openings per year for roustabouts in the New Orleans area and about 110 openings per year for the State of Louisiana. TR. 159. Mr. Stokes opined that Mr. Snear could earn as much as a roustabout as he was earning at Nabors in August 2000. TR. 159.

Mr. Stokes also indicated that Mr. Snear did not have a loss in wage-earning capacity because he was currently earning \$12.00 per hour at Industrial Coatings while he reportedly had earned only \$11.00 per hour as a roustabout. RX-20, p. 16.

Charles Monroe, Jr. and Industrial Coating Contractors, Inc.

On September 20, 2002, Mr. Snear completed a medical history questionnaire in relation to his employment application with Industrial Coatings. RX-22, pp. 12-16. Mr. Snear indicated that he did not have any disability or physical or mental condition that restricted him in any way, that he was not born with any disability of any type, that he had never suffered an accident or injury, illness or disease while on the job, that a doctor had never restricted his activities, and that he had never had pain with his head, eyes, ear/hearing, neck, shoulders, arms, hands/fingers, upper back, chest/heart, lower back, legs, knees, ankles, or feet/toes. RX-22, pp. 12-16.

Charles Monroe, Jr. testified that he was the field operations manager at Industrial Coatings. RX-25, p. 5. Mr. Monroe testified that he supervised employees and observed how they worked. RX-25, p. 6. Mr. Monroe testified that he knew Mr. Snear and that Mr. Snear worked as a helper/brush painter, earning \$12.00 per hour and working 40 hours per week. RX-25, pp. 6-7.

Mr. Monroe testified that part of Mr. Snear's duties included lifting 100-pound sandbags about four feet high to pour into a sandblasting pot. RX-25, pp. 7-8, 16-18. Mr. Monroe testified that a worker was allowed to stand on pallets to gain leverage for this task. RX-25, pp. 16-18. According to Mr. Monroe, a worker might unload four to five pallets of sand a day, with each pallet containing 30 bags of sand. RX-25, p. 18.

Mr. Monroe testified that Mr. Snear also had to carry, generally on a daily basis, 60-pound buckets of paint. RX-25, pp. 9. Mr. Snear also had cleaning duties and was involved in painting that entailed climbing ladders, working off scaffolding, and painting overhead. RX-25, pp. 10-11. According to Mr. Monroe, Mr. Snear's work involved bending, stooping, squatting, and carrying ladders from one position to another. RX-25, p. 10.

Mr. Monroe testified that Mr. Snear had been able to perform his job duties, that he had not had excessive absences, and that he had not complained of pain or an inability to perform any of his tasks. RX-25, p. 12. Mr. Monroe testified that Mr. Snear was a good employee and was in good standing. RX-25, pp. 12, 21. At the time of Mr. Monroe's deposition on January 27, 2003, Mr. Snear had been working for Industrial Coatings about four months. RX-25, p. 12.

2. Employment Records

K. B. Kaufmann and Company, Inc.

Mr. Snear was hired by Kaufmann on October 29, 1998. RX-7, pp. 87, 106. In a health questionnaire signed by Mr. Snear on April 23, 1999, Mr. Snear indicated that he had never suffered from aches or pain in his back, that he had never had any physical disabilities, impairments, or handicaps, that he had never had a workers' compensation injury, that he had never received a disability rating for any reason, and that he had never received compensation or medical benefits under workers' compensation for any reason. RX-7, pp. 3-4. In a June 21, 1999 injury report, it is indicated that Mr. Snear was struck on the back and shoulder by a piece of rebar on May 24, 1999, resulting in upper back pain. RX-7, pp. 87, 103-05.

Global Marine Drilling Company, Inc.

Mr. Snear was hired by Global Marine on June 29, 2000. RX-8, p. 37. In his employment application with Global Marine dated June 8, 2000, Mr. Snear indicated that he

had completed the 12th grade at Carver High School. RX-8, p. 25. With respect to his work experience, Mr. Snear listed only three prior employers: Pellerin Construction, Mid City Electric, and Patent Plant Services. RX-8, p. 26. Mr. Snear left Global Marine due to confusion regarding whether he was hired as a utility helper or a roustabout. RX-8, pp. 31, 34-46, 39-40.

In a post-offer employee medical questionnaire dated June 8, 2000, Mr. Snear indicated that he had never sustained an injury nor sought medical attention for a physical problem, except for being stabbed in his left lower arm in 1984 which required stitches and had not caused him problems since. RX-8, p. 51. Mr. Snear indicated that he was not taking any medications, that he had never been told of any degenerative or arthritic changes in his back or neck, that he had never been restricted in his ability to lift, and that he was able to safely lift and handle 100 pounds. RX-8, p. 52.

Mr. Snear was also examined physically by Center for Work Rehabilitation, Inc., on June 8, 2000, on behalf of Global Marine. RX-8, pp. 47-48. Mr. Snear was evaluated for, among other things, his upper and lower extremity active ranges of motion, trunk and neck active ranges of motion, and upper and lower extremity strength. RX-8, pp. 47-48. Mr. Snear scored within normal limits for these tests. RX-8, pp. 47-48; RX-27, p. 23. Mr. Snear also successfully completed all the tasks and met all the functional requirements of a roustabout post-hiring assessment. RX-8, pp. 53-57. These functions and tasks included: (1) standing/walking for at least three hours without a break; (2) having functional upper extremity, lower extremity, cervical, and trunk range of motion; (3) lifting 35 pounds over his head from the floor for two repetitions; (4) lifting 75 pounds five feet high from the floor for two repetitions; (5) lifting 115 pounds to his waist level from the floor for two repetitions; and (6) various job simulative exercises which involved, among other things, climbing ladders, crawling, lifting and carrying weights, swinging on a rope, shoveling, and swinging a sledge hammer. RX-8, pp. 53-57.

Mr. Snear was also given a medical examination. RX-8, pp. 60-63. In a June 15, 2000 report by Occupational Medicine Clinic of Acadiana, Inc., Mr. Snear indicated that he had never had any low back injuries or trouble with his low back, that he never had any other major injury, that he was not taking any medication, that he never had an injury or illness as a result of his work, and that he was capable of lifting 250 pounds. RX-8, p. 60. Mr. Snear had a normal physical exam and was deemed employable without accommodations, pending a drug screening. RX-8, pp. 61, 63.

Wallace C. Drennan, Inc.

Mr. Snear was hired by Drennan on June 5, 2001. RX-5, pp. 3, 70. Mr. Snear was terminated on August 30, 2001, because of excessive absences and lateness. RX-5, p. 2. Mr. Snear indicated to Drennan on June 4, 2001, that he had never been injured on the job and that he had never received workers' compensation due to a work-related injury. RX-5, p. 11.

Mr. Snear also indicated that he did not have a knee, neck, or back injury, that he had never had an injury, disability, or illness that required him to miss time from work, that his activities had never been restricted by a doctor, and that he was not taking any medication. RX-5, pp. 23-27.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

By way of the OCSLA, the LHWCA provides workers' compensation coverage for the death or disability of workers injured on the Outer Continental Shelf. 43 U.S.C. § 1333(b). The OCSLA applies to all submerged lands, and artificial islands and fixed structures located thereon, which lie beneath navigable waters seaward and outside of state jurisdictional boundaries, and which are subject to the jurisdiction and control of the United States. 43 U.S.C. § 1331(a).

In this case, the parties do not contest jurisdiction under the Act. JX-1. Mr. Snear was employed by Nabors as a roustabout, and his injury allegedly occurred while he was working on a fixed platform on the Outer Continental Shelf in the Gulf of Mexico. TR. 29-30; CX-10; JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm

suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990).

1. Claimant's Showing of a Harm

The first prong of a claimant's *prima facie* case requires him to establish the existence of a physical harm or injury. Section 2(2) of the Act, 33 U.S.C. § 902(2), defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307, 311 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the same kind of injury might have occurred regardless of the employee's location. See id. The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980).

In this case, the Court finds that Mr. Snear has sufficiently fulfilled the first prong of establishing a *prima facie* case of compensation. Mr. Snear testified that he injured his neck, left shoulder and arm, and left leg on August 30, 2000. TR. 34, 37. Mr. Snear also had complaints of back pain, as is documented in the medical evidence in this case. RX-4, p. 6; RX-16, p. 13; RX-24, pp. 6-7; RX-28, p. 7.

2. Claimant's Showing of a Work Accident or Working Conditions

In order to invoke the § 20(a) presumption, a claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The § 20(a) presumption does not assist the claimant in establishing the existence of a work-related accident or working conditions that could have caused the harm. See Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, the claimant must make such a showing by a preponderance of the evidence.

The Court finds Mr. Snear also has fulfilled this prong of establishing a *prima facie* case. Mr. Snear testified that he was hurt on August 30, 2000, due to a fall he sustained while at work for Nabors. TR. 32. Mr. Snear testified that he tripped and landed on his elbows when his shoestring got caught on a ground screw. TR. 32. Mr. Snear reported this

accident to Nabors on August 31, 2000. TR. 33; CX-10. The Court finds that Mr. Snear's injuries could have been caused by tripping over a ground screw at Nabors and that Mr. Snear has sufficiently established that such working conditions existed at Nabors. Given the foregoing, the Court finds Mr. Snear has established a *prima facie* case and is entitled to the § 20(a) presumption concerning causation of his injuries.

3. Employer's Rebuttal Evidence

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

Nabors has presented evidence that Mr. Snear had previously injured his left shoulder, back, and neck on May 24, 1999, in an accident while working at Kaufmann. TR. 49-50, 59-60, 74, 134; RX-2, pp. 7, 16; RX-14, p. 9; RX-16, p. 9; RX-18, p. 11; RX-23, pp. 8-11. Mr. Snear also had symptoms of his left leg giving way prior to the Nabors accident. TR. 82, RX-2, p. 2; RX-4, p. 14; RX-18, p. 14; RX-23, p. 23. Furthermore, Nabors has demonstrated to the Court that Mr. Snear has lied about his medical condition and employment history on numerous occasions, as is detailed below. Therefore, the Court finds that Mr. Snear is not credible and that his unsupported testimony is not reliable. For these reasons, the Court finds that Nabors has successfully rebutted the § 20(a) presumption regarding causation.

4. Causation Based on the Evidence as a Whole

Because Nabors has successfully rebutted the § 20(a) presumption, the issue of causation must be resolved based on the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991). The Court finds that the evidence as a whole weighs in favor of finding that Nabors is not responsible in this case. First, Mr. Snear has lied about his health and employment history on so many occasions that he is not credible in the Court's view. Second, the only alleged witness to the accident that appeared in this case testified that he did not remember any accident involving Mr. Snear at Nabors in August 2000. Third, the medical evidence weighs in favor of finding that Mr. Snear had pre-existing medical conditions and that any accident at Nabors did not cause a harm to nor an aggravation of these conditions. In short,

the evidence as a whole weighs in favor of finding that Mr. Snear did not suffer any injury related to his employment at Nabors.

First, the evaluation of witnesses' credibility, including that of medical witnesses, is for the trier of fact. Darcell v. FMC Corp., 14 BRBS 294, 296 (1981). As previously stated, the Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Court's finding that Mr. Snear is not credible is well supported by the record.

Mr. Snear admitted lying under oath at his deposition about not having neck pain prior to working at Nabors. TR. 66-67, 70-71. Mr. Snear admitted lying to Dr. Ott regarding whether he had any accidents or injuries prior to the alleged Nabors accident and whether he had any neck or back problems prior to the alleged Nabors accident. TR. 79. Mr. Snear also lied on the medical questionnaires for his physical evaluations at Global Marine and Drennan. TR. 91-92; RX-8, pp. 51-52, 60. After initially acknowledging before the Court that his left leg had given way prior to his Nabors accident, Mr. Snear subsequently denied precisely such an occurrence. TR. 82, 106. The records of Dr. Flood, Dr. Ott, and Dr. Walker indicate that Mr. Snear did indeed have problems with his left leg giving way prior to his alleged Nabors accident. RX-2, p. 2; RX-4, p. 14; RX-18, p. 14; RX-23, p. 23. Mr. Snear also withheld from Dr. Webster the fact that he suffered an injury at Kaufmann in 1999, prior to his alleged Nabors accident, that affected many of the same areas allegedly injured at Nabors. RX-9, pp. 6, 18; RX-28, p. 8. Likewise, Dr. Bartholomew testified that Mr. Snear had not disclosed to him that Mr. Snear had severe neck pain extending to both shoulders, mid and low back pain, headaches, and giving way of the left leg prior to the Nabors accident. RX-24, p. 14.

Mr. Snear also admitted he lied to Nabors about never having drawn workers' compensation and never having had a neck, back, hand, arm, knee, or leg injury. TR. 59, 63. Mr. Snear concealed his employment with Kaufmann from Nabors because he did not want Nabors to find out he had filed a workers' compensation claim against Kaufmann. TR. 56-57. Mr. Snear testified that he probably lied on the applications to all his employers after Nabors and that, prior to working at Nabors, he also lied on his applications to Kaufmann, Global Marine, and Chailland. TR. 125-26. Mr. Snear lied to these employers about his medical condition and medical history. TR. 86, 88, 91-92, 122-25; RX-7, pp. 3-4; RX-8, pp. 51-52, 60; RX-22, pp. 12-26.

Furthermore, Mr. Snear's credibility has been questioned by others who have examined him. While treating Mr. Snear in February 1995 for a car accident, Dr. Ott indicated that he felt Mr. Snear was somewhat inconsistent and perhaps was anticipating pain. RX-4, p. 14. While treating Mr. Snear in September 2000 for his alleged Nabors accident, Dr. Ott again indicated doubt as to the sincerity of Mr. Snear's reported symptoms. RX-4, p. 7. Dr. Ott indicated that Mr. Snear's symptoms did not correlate well to Dr. Ott's

findings. RX-4, p. 7. Dr. Nutik treated Mr. Snear for his Kaufmann accident, and Dr. Nutik indicated that Mr. Snear showed inconsistencies upon clinical examination and was not giving maximal cooperation during evaluations. RX-14, pp. 6, 9, 13. Likewise, the functional capacity evaluation performed by Riverside Physical Therapy on December 14-15, 1999, indicates that Mr. Snear did not give a maximal effort and was magnifying his symptoms. RX-3, p. 2.

Given Mr. Snear's disregard for the truth, especially concerning his medical history, the Court finds that Mr. Snear's unsupported testimony is not reliable. The Court simply cannot determine which of Mr. Snear's conflicting statements are true and which are false.

Second, Terry Jackson was the only alleged witness of Mr. Snear's accident at Nabors to appear before the Court. Mr. Jackson testified that while he remembered working with Mr. Snear, he did not remember any accident involving Mr. Snear in August 2000. TR. 21-25. Mr. Jackson further testified that he believed he would remember an accident in which Mr. Snear was working with him and fell to the ground. TR. 26-27. In fact, Mr. Jackson was able to recall work accidents from fifteen to twenty years ago. TR. 26. In addition, Ross McBryde, who investigated Mr. Snear's allegations on behalf of Nabors, testified that Mr. Jackson likewise indicated in November 2001 that he did not remember nor witness Mr. Snear's alleged accident. TR. 150, 152.

Mr. Snear testified that Mr. Jackson witnessed the accident and advised him twice to report the accident, once at the time of the accident and again the next night. TR. 32-33, 52-53. Based on the Court's observation and evaluation of Mr. Jackson and his testimony, the Court finds it unlikely that Mr. Jackson would have no memory whatsoever of the accident if indeed he were as actively involved as Mr. Snear described.

Third, the medical evidence in the record supports a finding that Mr. Snear is not entitled to compensation in this case. The Court finds that Mr. Snear had pains in his neck, back, left shoulder, and left leg that pre-existed his alleged fall at Nabors. Mr. Snear testified that he had pain in his left shoulder, back, and neck due to his May 24, 1999 Kaufmann accident. TR. 74, 134. The medical records of Drs. Ott, Flood, Nutik, Cleggett-Lucas, and Walker document that Mr. Snear had pain in these areas prior to the Nabors accident. RX-2, pp. 7, 11-17; RX-4, pp. 14-16; RX-14, p. 9; RX-16, p. 8; RX-18, p. 11; RX-23, pp. 8-10, 17-18. Mr. Snear also had problems with his left leg giving way prior to the alleged Nabors accident. RX-2, p. 2; RX-4, p. 14; RX-18, p. 14; RX-23, p. 23

In addition, Dr. Flood indicated that Mr. Snear had a herniated disc in his neck and was permanently disabled from heavy work prior to his alleged Nabors accident. RX-2, pp. 2-5; RX-19, pp. 2-3; RX-23, pp. 19, 21-24. Dr. Flood indicated, prior to the alleged Nabors accident, that Mr. Snear was capable of only medium level work. RX-23, pp. 23-24. After reviewing Mr. Snear's November 18, 1999 cervical MRI, Dr. Bartholomew agreed with Dr. Flood that Mr. Snear had a herniation prior to the alleged Nabors accident. RX-24, pp. 29-

30. In addition, Mr. Snear's functional capacity evaluation of December 14-15, 1999, also placed Mr. Snear's work level at medium work. RX-3, p. 2.

Of the other doctors in the record who treated Mr. Snear, only Dr. Nutik had an opinion as to Mr. Snear's disability status prior to his alleged Nabors accident. Although Dr. Nutik had indicated on November 15, 1999, that he did not anticipate any permanent disability for Mr. Snear related to the Kaufmann accident, Dr. Nutik indicated that it was difficult to assess Mr. Snear's ultimate work capacity because Mr. Snear was not showing maximal cooperation during evaluations. RX-14, p. 6. Dr. Nutik subsequently indicated on February 16, 2000, that he concurred with the findings of Mr. Snear's December 14-15, 1999 functional capacity evaluation and the conclusion that Mr. Snear was capable of at least medium work. RX-14, p. 2. At the least, Dr. Nutik's opinion that Mr. Snear would not be permanently disabled as a result of the Kaufmann accident is equivocal, in that he expressed difficulty in actually determining Mr. Snear's work ability and subsequently agreed that Mr. Snear had a limited work ability. At the most, Dr. Nutik's concurrence with Mr. Snear's December 14-15, 1999 functional capacity evaluation supports a finding that Mr. Snear had a decreased level of functioning as a result of the Kaufmann accident, prior to his alleged Nabors injuries. In either case, the Court finds that the weight of the medical evidence, including evidence from Dr. Flood, Dr. Bartholomew, and Mr. Snear's functional capacity evaluation, supports a finding that Mr. Snear was not fully resolved of his medical problems from the Kaufmann accident before he allegedly fell at Nabors.

With respect to Mr. Snear's neck, back, left shoulder, and left leg, the medical evidence does not support a finding that there was any worsening or aggravation of his pre-existing pains. Mr. Snear was treated by Drs. Ott, Webster, Leclercq, Bartholomew, and Steck for his alleged Nabors accident. Of those five doctors, only Drs. Webster, Bartholomew, and Steck compared Mr. Snear's condition after his alleged Nabors accident on August 30, 2000, with his condition prior to August 30, 2000. Dr. Steck testified that his evaluations of Mr. Snear revealed no objective evidence of any acute injury or aggravation of Mr. Snear's pre-existing condition. RX-26, pp. 21, 35-36. Drs. Webster and Bartholomew indicated that Mr. Snear's alleged Nabors accident did cause and/or aggravate the conditions in his neck, back, left shoulder, and left leg.

However, the opinions of Drs. Webster and Bartholomew rely on Mr. Snear's subjective complaints of pain and the inaccurate medical history provided to them by Mr. Snear. Dr. Webster testified that she found no objective medical evidence that Mr. Snear was injured from his alleged accident at Nabors. RX-28, pp. 10, 17-18. Instead, she testified that her findings were based on Mr. Snear's subjective complaints of pain. RX-28, pp. 10-12, 17-18, 22. In addition, Dr. Webster's opinion that Mr. Snear's symptoms more likely than not resulted from his alleged Nabors accident was based on the inaccurate belief that Mr. Snear had no similar symptoms prior to his alleged Nabors accident. RX-28, pp. 10-12.

Likewise, Dr. Bartholomew testified that Mr. Snear had not disclosed that he had, prior to the Nabors accident, severe neck pain extending to both shoulders, mid and low back pain, headaches, and giving way of the left leg. RX-24, p. 14. Dr. Bartholomew indicated that Mr. Snear had a herniated disc in his cervical spine following his alleged Nabors accident. RX-6, p. 13; RX-24, pp. 8-9. However, Dr. Bartholomew was not aware that Mr. Snear had undergone a cervical spine MRI on November 18, 1999, which indicated he had a herniated disc even before the Nabors accident. RX-6, p. 13; RX-24, pp. 8, 16-17, 29-30. Regarding this misinformation, Dr. Bartholomew testified that he would have to compare the two MRIs side-by-side in order to determine whether there were any worsening after the alleged Nabors accident. There is no evidence in the record as to any such comparison by Dr. Bartholomew.

Despite the misinformation provided to her by Mr. Snear, Dr. Webster nonetheless opined that Mr. Snear's elbow, knee, and forearm symptoms were related to his employment at Nabors. RX-28, p. 14. Dr. Bartholomew also maintained, despite having been misinformed by Mr. Snear about the November 18, 1999 MRI, that the Nabors accident caused an aggravation of a pre-existing condition in Mr. Snear's neck. RX-24, pp. 30-31. However, discounting the inaccurate medical histories and subjective complaints reported by Mr. Snear, who the Court has already determined lacks credibility, there is no sound basis for these opinions of Drs. Webster and Bartholomew. There is no objective medical evidence which indicates a worsening of Mr. Snear's neck, back, left shoulder, or left leg condition following the alleged Nabors accident. Although Drs. Webster and Bartholomew to some extent maintained their prior opinions, the Court finds that their opinions are undercut by Mr. Snear's misinformation and are unreliable.

Mr. Snear also underwent an MRI of his left shoulder on April 11, 2001, following the Nabors accident. RX-12, pp. 3-5; RX-48, pp. 6-8. The MRI revealed possible damage to Mr. Snear's left shoulder. RX-12, p. 5; RX-48, pp. 6-8. However, given that Mr. Snear had problems with his left shoulder prior to the alleged Nabors accident, the MRI is insufficient to establish that Mr. Snear's left shoulder damage was caused by the alleged Nabors accident. Likewise, because there is no pre-Nabors study to which the April 11, 2001 MRI can be compared and because there is no reliable medical opinion on the issue, the Court finds that the evidence is insufficient to find that the alleged Nabors accident caused or worsened damage in Mr. Snear's left shoulder.

Although he had pain in his left shoulder, back, neck, and left leg prior to the alleged accident at Nabors, Mr. Snear testified he did not have left arm pain until after the alleged Nabors accident. TR. 74, 141; RX-2, pp. 2, 7, 11-17; RX-4, pp. 14-16; RX-14, p. 9; RX-16, p. 8; RX-18, pp. 11, 14; RX-23, pp. 8-10, 17-18, 23. As discussed earlier, the Court finds that Mr. Snear is not credible and his unsupported testimony is unreliable. With respect to Mr. Snear's left arm, there is no objective medical evidence of an injury. Mr. Snear's unreliable subjective complaints are an insufficient basis for finding that he has a left arm injury related to his employment at Nabors. Given the foregoing, the Court finds that the

evidence as a whole weighs in favor of finding that Mr. Snear did not suffer any injuries for which Nabors is responsible.

SECTION 26 SANCTIONS

Nabors seeks a finding that Mr. Snear has violated § 26 of the Act and is accountable for the sanction penalties under that section. Section 26 of the Act, 33 U.S.C. § 926, states:

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Although the Court has denied Mr. Snear's claim for benefits, the Court does not find that his claim was instituted or continued unreasonably so as to implicate § 26 of the Act. Mr. Snear established a *prima facie* case of compensability and Mr. Snear had, from a pre-hearing standpoint, some reasonable likelihood of prevailing in his claim. See Bolden v. U. S. Stevedores Corp., 18 BRBS 172, 174 (1986).

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that Claimant's claim for benefits is **DENIED**.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge